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## Notes on Early Land Titles and Tenure in Hawai'i

FOR SEVERAL REASONS HAWAI'I'S LAND has always excited unusual interest. First, the amount available for settlement and cultivation is limited. Again, ownership of large areas has been concentrated in relatively few hands. This is explained partially by Hawaiian landholding practices. Large chiefly and royal estates have survived in significant instances, while extensive grants to certain individuals created sizable private landholdings still in existence as this or that "estate." Substantial and continuing population growth, especially since statehood in 1959, has greatly increased pressure on and demand for "fee simple" holdings and has inspired conversion from agricultural to urban and residential use. Finally, we may note the emergence of the "Hawaiian Renaissance" and the Hawaiian sovereignty movement. Land matters are a central consideration in the awareness and activities associated therewith. A number of recent publications are devoted primarily or in large part to this subject.<sup>1</sup>

The purpose of this article is to give a short historical review of events culminating in the Mahele and the legislation of unrestricted fee-simple land ownership. It is written to inform those who may have some interest in the topic but lack the resources to make an independent study.

In mid-March 1841, William Richards, political counselor to the Hawaiian government, answered a number of questions posed by Lt. Charles Wilkes of the U. S. Exploring Expedition. One concerned

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*The Hawaiian Journal of History*, vol. 30 (1996)

landholding. Richards wrote that in the days of warring Hawaiian chiefs, victors divided their conquests in a process called "cutting up the lands." The leader took the best places for himself and placed his servants or agents thereon to supervise cultivation. Many or most of those actually tilling the soil stayed put. The "cutting" demanded finesse; dissatisfied recipients "not infrequently" started wars of their own. Under an essentially feudal system, those rewarded owed fealty and support to the overlord in all his endeavors. The new landlords cut their lands into smaller portions, which might be divided in a sort of chain reaction to the sixth or seventh degree. Each recipient owed fealty to his immediate supervisor. Common laborers got on the average one-third of their production. But this was not sure. "Jealousy, favoritism and fickleness were universal." The wise tried to get small holdings under different chiefs. "There was no fixed law, courts of justice, or source of appeal," so that "people were in effect tenants at will." However, "among all the better classes it was considered improper to eject the direct cultivators of the land, even though the chiefs above them were dispossessed." One may remark here that this practice avoided interrupting the smooth flow of the taxes in kind upon which landlords depended for their support.

By 1795 Kamehameha I had conquered all the major Hawaiian islands except Kaua'i. Following custom, he kept a part of the land for himself to be managed and tilled by his servants and personal retinue. The rest he divided among his warrior chiefs, instituting the process described above. All recipients had rights—not very clearly defined—in the land or its products. In the division of land the *ahupua'a* was the main functional unit—a strip running from the mountain top into the sea and including a fishery, a beach, a stretch of tillable land, and forest. But there were also transverse lines. Though they varied greatly in size, *ahupua'a* had definite boundaries; they were held, not owned, by chiefs. Many were subdivided into smaller lands.

The assignment of real estate included every square foot of the islands' 4,118,000 acres. Although everything was apportioned, much was unoccupied. According to John I'i, a member of the Privy Council, no one could take vacant land without first getting the owner's consent. But Premier John Young (Keoni Ana) said that a Hawaiian could squat on and cultivate an empty place. In any event, the new-comer subjected himself to all customary obligations.<sup>2</sup>

Those controlling land could claim produce and labor, but rarely or never military service, from the "lower orders" or from their inferiors; all, regardless of rank, paid to the king a land tax and rendered personal service at his pleasure. Additionally, they owed both obedience and some part of their lands' production.

In the mid-1840s prominent Hawaiians discussed the workings of the native system. High chief Abner Pākī remarked that a high chief could not take land from an inferior chief to give to a third person without asking permission, though perhaps a brother or sister might do so. If a fault incurred the king's displeasure, he could take away the land, but he would not do it without sending for the person involved. The taking of land by a superior, from the king down, without such personal contact was, according to Pākī, a "great crime." A child could not dispose of his own lands until he was twenty or more years old, according to ancient usage. If the child's guardian approved of the gift, they could present it together. Pākī testified that if he should buy out the rights of all his tenants, he would consider a third to be due to the king.

Mataio Kekūānao'a, governor of O'ahu, agreed to the necessity of cooperation between child and guardian cited by Pākī. He added that no land became the property of a person through mere occupancy. Propriety required that a landlord should not dispossess a tenant without fault, though the former would judge whether a fault had been committed. Should a fault occur, the landlord would dispossess the tenant at once with informing him. It was never customary for a child to dispose of his land without the father's consent during the father's lifetime—or without the consent of near relations or a guardian if parents were dead. It was not customary to dispossess tenants when landlords changed. If there had been an agreement between old and new landlords, they sometimes dispossessed tenants, but not without a fault. According to ancient usage, the premier could take away land and give it to another. Consent might be asked, but it could not be refused. It was agreeable to ancient usage for chiefs to take possession of land either with or without the approval of the tenant and to confer it on whom they pleased. In this connection, it was noted that on the death of a landlord, the rights of heirs and tenants were often disregarded in favor of a new class of people.<sup>3</sup> Ambiguities in these accounts suggest that the chiefs did pretty much as they wished.

Requirements for landholding described above applied to Hawaiians who got property from the first two Kamehamehas. Failure to contribute any stipulated tax or service justified forfeiture.

Under Kamehameha III the situation changed. Ralph S. Kuykendall commented:

In 1825, the same council of chiefs that seated Kauikeaouli on the throne as Kamehameha III gave its sanction to the principle of heredity in land holding, thereby strengthening the position of the land holding aristocracy which then existed. The great chiefs by this time, therefore, had attained comparative security and permanence in their possession of immense landed estates. But the same measure of security did not exist for the lower classes; they were as much subject to the caprice of their overlords as they had ever been, and contemporary evidence strongly suggests that the lot of the common people was harder during the early years of the reign of Kamehameha III than it had been during the time of Kamehameha I.<sup>4</sup>

Insofar as landed property was concerned, foreigners resident on the islands were in about the same position as the common people. Those who received grants of land held them by the same precarious tenure as Hawaiians.<sup>5</sup> The "grants" referred to went back in certain cases to very early days. Kamehameha I, indeed, had to deal with the foreign presence. The Russian Vasilii M. Golovnin described his policy:

Another principle of Tameamea [Kamehameha I] . . . is not to give any of the foreigners who come to his islands special privileges but rather to act in the same way with all, allowing everyone to trade freely and equally with his subjects but forbidding the Europeans to establish their own settlements. With this in view, he grants control of land to Englishmen and Americans in his service only on the condition that the grants will remain theirs only so long as they reside on the Islands. They may not, under any circumstances, transfer these lands to another person; and the estates revert to the king on their death or departure. . . .

Some grants originated in personal esteem or "fancy," some rewarded services of one sort or another, and some were "bought" in a sense.

The researcher encounters expressions such as “in those days writings were uncommon” and “the usual loose verbal way of the country.” Boundaries were marked, but actual measurement of property lines rarely occurred.<sup>6</sup>

Foreigners had to meet customary and legal assessments, but since they were not natives they had to be fitted into the system somehow. Stephen Reynolds, a permanent resident since 1823, testified that, “In those days, no one thought of erecting houses without consulting a chief. . . . Pecuniary compensation was unknown here.” Soon after Reynolds arrived, Kalanimōkū, Kamehameha I’s prime minister and adviser, told him that if he wanted a piece of land he should contact one of the chiefs. If none was in Honolulu, he should “go to the man in the fort.” If he wished to sell land, he should follow the same course, because the chiefs liked to know into whose hands the lands went. Reynolds always supposed that it was understood that if land was to be bought of one chief it should be done with the knowledge of the other chiefs. Reynolds was only one of a number of foreigners who had land dealings with Kalanimōkū. This led some to regard him as the sole authority in such matters—or even as regent. Actually, he was a sort of business agent for Ka’ahumanu, Kamehameha’s widow and for some years the true regent, and consulted with her before acting. His position was similar to that of Pāki under Liliha, a female chief and wife of Boki, or of Kekūānao’a under Kīna’u, the *kuhina nui* from 1832 to 1837.

Reynolds used the terms “buy” and “sell.” Robert Boyd, a resident since 1822 and high sheriff from 1843 to 1845, expanded on these concepts in his testimony regarding land claims. Boyd agreed that in 1822 one could not take possession of land as he chose. He would have to get the sanction of a chief. Boyd outlined the process: A foreigner would make friends with a chief and ask him to build a house and would give him money. The chief might then ask where the foreigner wished to have the house. A place would be pointed out. It was the usage to enclose as much land as the applicant desired and could pay for. The more he could pay, the better pleased was the chief. In that time there were no purchases as foreigners understood the term. The money was given to enable the chief to build a house for the applicant. Boki, a chief and one-time governor of O’ahu, had

been quite explicit in telling Boyd that when he (Boki) "sold land" he sold only the privilege of using the site and the improvement. There was no such thing as giving a deed for land.<sup>7</sup> In that day, Hawaiians could convey the right to occupy and the improvements only. An "enclosure" was surrounded by a fence or wall to prevent encroachment. It was customary to enclose lots in towns, and by 1837 everyone granted a site was careful to get all he could. There had been several instances of places being sold on valuation (privileges of site and improvements). David Lyon (Kiwalao), a favorite of Kamehameha I's wife, Keōpuōlani, who came to Hawai'i in 1801, noted that in early days anyone could take all that he could enclose.<sup>8</sup>

Boyd's testimony seemed to refute Reynolds's statement regarding the use of money in early land transactions. Early-day hotel owner Joseph Navarro said that he paid Kamehameha I in dollars.

Once a place was "bought," the question of tenure arose. Boyd had ideas about this, too: If a chief became angry with a Hawaiian or foreign tenant, he would confiscate land, houses, and furniture. Chiefs acted entirely at their own caprice, and it was always considered that a chief could revoke his grants. In 1845 Boyd said that he "had never heard that principle doubted till quite lately."<sup>9</sup>

Boyd spoke from the foreigner's position. In Honolulu many Hawaiians occupied family lands, lived with relatives, or bought from other Hawaiians. A considerable number took up waste or vacant lands later awarded to them. Several such unoccupied places lay in the neighborhood of the American mission; these attracted those who wanted to be, as claimants put it, "near the word of God." Some proved not especially choosy; Manuiki staked his claim on a former dung pit; elsewhere Kaikio'ewa accepted from Keaniani an old-time graveyard.

As land values rose, friction grew. Recognizing this, Kamehameha III sought to protect common Hawaiians everywhere by a voluntary declaration of rights in 1839:

Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property, and nothing whatever shall be taken from any individual, except by express provision of the laws.

But every tenant of land had to work thirty-six days a year for the king or the government.<sup>10</sup>

The law and constitution of 1840 reaffirmed the sanctity of persons and property. The English translation of the constitution, indeed, stated that the lands belonged not to the king as his private domain, but "to the chiefs and people in common." The Hawaiian-language version omitted the phrase "in common." The king's role was that of managing head. As matters worked out, neither declaration nor constitution adequately shielded inferior chiefs and tenants, who were often exploited. The constitution did for the first time distinguish the king and the government as separate entities and therefore also distinguished government lands and the king's private lands. This was the situation, then, of the native Hawaiians. They entered the 1840s without adequate defenses against rapacious landlords, but the traditional duty of obedience prevented effective opposition.

In mid-March 1841, William Richards wrote to Lt. Charles Wilkes that "As of now, tenure may be considered that of perpetual lease." Rents were regulated by law, and no new tax could be laid without the assent of the people's representatives. But operation of the new dispensation was crippled by officials' fear of acting against the interests of the chiefs.

Compliance with tenant obligations gave an inviolable right to occupancy, and tenant burdens had lightened greatly. Nevertheless, in 1845 Keoni Ana opined that obligations were still such that Hawaiians did "not wish for lands."<sup>11</sup>

#### EVOLVING LANDHOLDING PRACTICES, 1817-1850

Having in mind this introductory sketch we can take a different tack, noting chronologically events of lesser or greater importance during the thirty-three years from 1817 to 1850. LCA numbers refer to awards of the Board of Commissioners to Quiet Land Titles, discussed later, and are used to locate various properties in Honolulu.

In 1817, Kamehameha I gave LCA 65 to ship captain William Bacle for services rendered.<sup>12</sup> Two years later, William Sumner, a sea captain, occupied LCA 155 for services rendered. He originally took up the place as waste land and without a grant.<sup>13</sup>

About 1821 Boki or Liholiho (Kamehameha II) gave LCA 644 to storekeeper William G. Dana, a nephew of trading captain William Heath Davis, Sr.<sup>14</sup>

In September 1823, Boki and Kalanimōkū stripped old-time resident Francisco Marin, pioneer hotel keeper William R. Warren, Joseph Navarro, and merchant Jonathan Temple of their property.<sup>15</sup>

In 1823 or 1824, James Robinson got LCA 4 in the "usual loose verbal way of the country" from Kalanimōkū for services rendered.<sup>16</sup>

LCA 34 was a vacant common in 1825 when Kekūanao'a and Kinopu told John Neddles, a half-Chickasaw Indian who settled in Hawai'i about 1817, to take it.<sup>17</sup>

In 1826, Kalanimōkū and Boki gave former mariner George Wood (John Lavall) LCA 18 by word of mouth, for at that time "writings were not common in such cases."<sup>18</sup>

Henry Farmer, a shipwright living on land he had got from Kaikio'ewa, was ejected in 1827. British consul Richard Charlton then gave him LCA 51 as a good place to work on ships.<sup>19</sup>

In 1829, missionary Hiram Bingham charged that Boki had tried to get or make a new division or appropriation of lands without proper authority.<sup>20</sup>

This was the decade that saw Hawaiians moving into the empty lands around the American mission. Examples were Honokaupu (LCA 685), Kaheana (LCA 2019), Kaihe (LCA 992), Kalaiheana (LCA 2293), Kaluahinenui (LCA 804), Kukiiahu (LCA 191B), La'anui (LCA 278), and Naopae (LCA 778).<sup>21</sup>

Late in March 1831 a meeting of chiefs at the fort named John Adams Kuakini governor of O'ahu. At the same time, a new law provided for leasing lands to the people, with only an annual tax to be paid. No one was to trespass against lessees.<sup>22</sup> In April, Alexander Smith offered Kuakini \$12.00 a year for his ground. The governor "gave a writing" that the place should always remain with Smith or with any to whom it might be sold. The governor said that he should make all residents pay.<sup>23</sup>

That October, Captain Hinckley refused to give up a place to which he held an illegal deed from Kaikio'ewa. Ka'ahumanu told him that he could not leave the island until he had surrendered the deed. On the advice of his consul, Hinckley did so.<sup>24</sup>



In December 1831, Governor Adams and Ka'ahumanu decreed that where a house had burned, no building could be erected.<sup>25</sup>

A royal order in April 1834 forbade any foreigner to build with stone, mud, or boards—nothing but grass.<sup>26</sup> The following month, however, the king told Henry Peirce that he could build a stone or mud house, but that when he left the island, the house and premises would be the king's.<sup>27</sup>

In 1836, George Chapman was forcibly removed from his house for an "affray" therein, and Abner Pāki locked it. The English seamen boarding there under consular care were ousted. The property was restored under pressure from Lord George Russell of the *Actaeon* and British officials.<sup>28</sup>

Kekūanao'a sent Hawaiians up to Henry Paty's in July 1836 to take charge of the house. Paty appealed to the U.S. consul. Matters were taken to Kina'u, who restored everything.<sup>29</sup>

In October 1836, many residents went to the fort with Commodore E. P. Kennedy of the U.S.S. *Peacock*, then in port, to see Kina'u. They asked for the right to sell privileges of enclosures and that well-behaved foreigners be allowed residence. They went again the next day, but the king would not agree to the foreigners' right to transfer property, which he refused to let them dispose of without his consent. He also restated his "policy of not allowing foreigners to have the outright ownership of land." The king was urged to sanction the granting of leases, but although he agreed in principle, he would not give consent in writing; the matter required more consideration.<sup>30</sup>

The king subsequently said that he was going to give his own people land; if any was left, he would lease it to foreigners.<sup>31</sup>

In November, Lord Edward Russell of the British ship *Actaeon* concluded a treaty giving Englishmen the right to reside in Hawai'i during good behavior, to build houses and warehouses with the king's consent, and to dispose of property with his knowledge. The treaty specifically recognized that the land on which houses were built belonged to the king, but provided that he had no authority to destroy the houses or injure property.<sup>32</sup>

In 1837, Luther Wright held LCA 17 by verbal title, resting on the "tacit permission and generous allotment of land made by the chiefs in so many past instances to foreigners." Eli Jones and Alex. Muir

bought from Wright in that year. The three gave Kīna'u the prior option of buying, in accordance with the treaty concluded with Lord Russell as interpreted by P. A. Brinsmade.<sup>33</sup>

Henry A. Peirce wrote to James Hunnewell in August of 1837 that the visits of American, English, and French men-of-war during the past sixteen months had "established inviolability of property and persons. . . ." <sup>34</sup>

The following year, A. H. Fayerweather testified that when Peirce and Brewer got their original premises there was no registry office, nor law requiring registration.<sup>35</sup>

The king's written gift of LCA 26 to Jules Dudoit in 1840 stipulated that the king should be offered the option of purchasing at the price named by any other prospective buyer.<sup>36</sup>

In July 1840, Governor Kekūanā'o'a, in a letter to the French consul, explained that land was not sold—only the house. When a foreigner left the islands, he could sell his house, but not the land.<sup>37</sup>

In 1841, Eugene Sullivan sold LCA 41 but "had no better title than the usage of the country."<sup>38</sup>

A proclamation of the king and premier (Kekāuluohi) in May 1841 noted that some farms and house lots held by foreigners were properly conveyed by leases bearing the king's name. But foreigners also held many other sites without title or authority, occupied by their own will alone. Therefore, island governors were commanded to make leases with foreigners desiring house lots or farms. Such leases could not be for more than fifty years, and shorter leases would have lower rates.<sup>39</sup> Protests and heated discussion followed this serious attempt to regularize landholding by foreigners, who saw the proclamation as a vehicle designed to rob them of their rights. Stephen Reynolds zipped into orbit with his biases showing and his usual cargo of exclamation points and capitals:

The missionaries have taken good care to have Leases and DEEDS for their lands, and now they are getting Laws (ex post facto) made to Rob the foreigners. Pious Knaves!! Robbers!!! If villains deserved the gallows, ever, they Do!

In the end, the Hawaiian government failed to compel the making of leases, and the king renounced the right to dispossess foreigners at pleasure.<sup>40</sup>

Government property began to be set apart in 1842, and a treasury board was appointed. The government, however, continued to have an "undivided and undefined claim in all land."<sup>41</sup>

In February 1843, Lord Paulet's British Commission, which had taken over the government of Hawai'i, temporarily froze all land transfers by sale or lease from natives to foreigners.<sup>42</sup>

Later, all foreigners having claims to land by deed, lease, or occupancy were ordered to register them with the commission before June 1. But when G. P. Judd examined the commission's land claims book, he did not find his own claims recorded. Judging from the volume's mutilated condition, he feared that many claims lay in the consulate uncopied.<sup>43</sup>

After restoration of Hawaiian rule, a law of August 1843 forbade the giving away or selling of any land in the future to foreigners; no such gift or sale by any Hawaiian would be valid.<sup>44</sup>

In September 1844, Judd of the Treasury Office gave a listing of titles—both leases and grants—recorded in that agency:

French	4
Hawaiian	26
American	55
British	32
Chinese	4
German	1
Spanish	3
Total	125

He noted that many claims remained unrecorded.<sup>45</sup>

In February 1845, Joseph Bedford's estate (C533) was put up for auction. William Hooper, acting U.S. consul, asked if foreigners could bid. Kekūanao'a's answer: only naturalized Hawaiian subjects could do so. Hooper protested, noting that foreigners already held landed property valued at \$500,000 and that Kekūanao'a himself had said that not four Hawaiians on O'ahu could raise \$500. Hooper demanded that the property be returned to him for disposal. But Kekūanao'a stood firm. The lot brought \$710.<sup>46</sup>

Discussion of land matters continued, and at the end of May 1845, the *Polynesian* printed the report of the minister of the interior (G. P. Judd). He recommended appointment of commissioners to inquire

into and determine the validity of all titles to lands and houses and issuance and registration of new written titles. Also, the whole system of land tenure should be reviewed in order to make tenure secure. Freehold sale of land to Hawaiian subjects should be initiated, in such lots and under such conditions as the legislature might determine. Many applications to buy or lease were already on file in the Treasury Department. Judd maintained that the king, the premier, and the chiefs wanted to improve tenure and leasing to encourage acquisition of land by the poorer classes.<sup>47</sup>

In October, the *Polynesian*, the official government organ, urged that Hawaiians be given fee simple titles to raise their motivation and industry. To this end, the chiefs should give freely of their land. But the chiefs were hesitant to give up their hold on the common people—a hold secured by the old system of feudal tenure and its concomitant labor dues. They felt, too, that in giving up land, they also gave up their governing powers.<sup>48</sup>

Strong antiforeign sentiment resulted in petitions from Hawai'i and Maui, where Lahaina was a center of disaffection. These asked that no naturalized foreigner should be allowed to hold any office, that all white officeholders should be expelled, that foreigners should be forbidden to take the oath of allegiance (become naturalized) hereafter, and that no more land should be sold to foreigners.<sup>49</sup> Royal commissioners visited Lahaina, and a legislative committee drafted a reply to the petitioners. This defended the policy of naturalizing foreigners and of selling land to such new citizens of Hawai'i. At the end of 1845 the king himself toured Maui and explained the necessity of employing foreigners.<sup>50</sup>

#### THE LAND COMMISSION

Such was the situation when a law of December 10, 1845—a part of the lengthy act to organize the executive departments of the Hawaiian government—provided for a Board of Commissioners to Quiet Land Titles. The law took effect sixty days after first publication in the *Polynesian*, which occurred December 20. The board got all the king's private and public powers over corporate lands claimed by private persons, with the aim of discovering and ensuring the rights of inferior chiefs and tenants. This would be done by "the investigation

and final ascertainment or rejection of all claims of private individuals, whether native or foreigners, to any landed property acquired anterior to the passage of this act." Those dissatisfied with the board's decisions could appeal to the Supreme Court. The act let the minister of the interior, with approval of the king and Privy Council, sell government land in fee simple to Hawaiian subjects. But no grant in fee simple could be made to aliens unless the right to a fee simple title had been got before passage of the act. Government lands could be leased to Hawaiian subjects or to aliens, but leases to aliens could not be for more than fifty years.<sup>51</sup>

The five members of the board were appointed on February 10, 1846; they were John Ricord, William Richards, Lorabela Kauwai, Ioane 'I'i, and James Young Kanehoa. The next day they organized, and on February 14 they gave public notice of their existence and activities. Claimants were invited to appear and were given until February 14, 1848, to file and then produce evidence of their rights to land.<sup>52</sup>

The commissioners enjoyed wide latitude, but they were bound by two legislated limits: (1) aliens were not allowed to get fee simple titles; (2) an alien could not get a leasehold unless he had secured a certificate of nationality. The commission could only determine the claimant's kind and amount of title; it could not grant leases or patents or receive commutation. Each piece of land had to be surveyed at the claimant's expense.<sup>53</sup>

The board's first regular business meeting was on March 4, 1846, and it heard its first testimony a week later. When sitting at Honolulu it met at Hale Kauila, Waikiki of the fort. By late August it had worked out a set of principles, which was ratified by the king and the legislative council two months later.<sup>54</sup>

Six rules guided the commission in judging claims: (1) When land had been got from the king or his authorized agent without a written voucher before June 7, 1839, the commission would inquire into the history of the transactions affecting that plot. In case there was no contest between private claimants, the board would give a freehold less than fee simple if the land claimed had been continuously occupied, built upon, or otherwise improved. (2) If there were counter claims to the same piece of land, the board would decide which claimant got the freehold. (3) When land had been got from anyone,

including the king, after June 7, 1839, the commission would inquire into the right of the grantor, donor, or lessor to dispose of the property and confirm or reject accordingly, regardless of occupancy, improvements, or consideration. (4) When claimants held legal and valid written grants, deeds, or leases got from lawful proprietors, the board would use the wording of the instrument to determine rights. (5) Titles would not be confirmed to claimants who had never occupied their claims or who had not occupied them since June 7, 1839. (6) The government's share in all awarded lands was one-third of the unimproved value of the land. Confirmed claimants could get fee simple titles (patents) to their lands by paying this amount to the minister of the interior.<sup>55</sup>

This sounded clearcut, but at the end of April 1847, the minister of the interior reported underlying problems: few lands had been offered for cession to the government in 1846 and 1847; therefore, the government could not supply lands to those wanting to buy or lease. Individual chiefs were prevented from selling by tenants and others who claimed undivided rights, and it yet remained to make a division of lands to the different persons holding such undivided rights. In past years, landed tenures had not been well defined; persons in possession of real estate had generally held it without written title, and often without any title traceable to the government. The government had made no sales until about the first of July, 1846; leases had been few, and usually for not more than five years. Private persons had often disposed of their possessory titles but had rarely given anything but a quitclaim deed. Titles were thus defective and imperfect.<sup>56</sup>

While the Board of Commissioners defined its principles and heard early claims, the government tried to secure an initial division between the king and the chiefs. On the eve of this endeavor, Hawai'i's biggest landholder was Victoria (Pikolia) Kamehamalu (usually called Kamāmalu), heiress of her mother, Kīna'u (and, through her, of Ka'ahumanu). Others with very large holdings included Keoni Ana (John Young, Jr.), Keohokālole, Konia, Pāki, and John 'I'i—perhaps fifteen persons in all. Below these were some five hundred or six hundred who among them controlled the remainder of the islands.

The king held very little or no land in his own right. Real property formerly in his possession he had given out to dependents or tenants. Under existing law, such people enjoyed inalienable rights to the lands they occupied as long as they paid the required taxes and labor. The situation was such that if the king wished to reward with land a worthy Hawaiian, he would have to beg someone for a place—and that someone had the power to refuse.<sup>57</sup>

On December 18, 1847, the Privy Council named a committee to plan an amicable division between the king and the chiefs. On March 30, 1848, G. P. Judd reported on behalf of the committee (himself, Keoni Ana, Mataio Kekūanao‘a, and Iona Pi‘ikoi), submitting a book of 225 pages. Lands assigned to the king were listed on the left, and those given to the chiefs were on the right. All concerned had fully consented to the division. Two hundred and forty-five chiefs (*konohiki* or landlords) recorded their divisions with the king in the Mahele Book. The Privy Council adopted the report and resolved to present it to the legislature meeting in April. King and chiefs alike had to pay commutation of one-third of the unimproved value of the land to the government to extinguish its interest. Additionally the chiefs (but not the king) had to present their claims to the land commission and receive awards. This division was, correctly speaking, the Mahele. Many chiefs failed to file their claims within the legal deadline, but in later years acts let them or their heirs get titles to lands granted in the Mahele Book.<sup>58</sup>

The king immediately divided his 2,500,000 acres into two parts. He kept just under 1,000,000 acres for himself and his heirs and successors. These were the “crown lands.” The other slightly more than 1,500,000 acres he donated to the government; these became known, appropriately, as “government lands.” W. D. Alexander had this to say about them:

In 1842 Government property began to be set apart by itself, and a Treasury Board was appointed . . . , but the Government still continued to have an undivided and undefined claim in all land in the Kingdom till the “Mahele.” The great mass of Government lands consists of those lands which were surrendered and made over to the Government by the King, Kamehameha III, and which are enumerated by name in the Act of June 7, 1848. To these must be added the lands

ceded by the several chiefs in lieu of commutation, those lands purchased by the Government at different times, and also all lands forfeited to the Government by the neglect of their claimants to present their claims within the period fixed by law.

"Lands ceded by the chiefs" refers primarily to a second division in the summer of 1850 when most of the chiefs gave a third of their lands to the government in order to get allodial (absolute) title to the remainder. "The whole transaction was a severe test of their patriotism, and reflects great credit on that Hawaiian aristocracy which thus peacefully gave up a portion of its hereditary rights and privileges for the good of the nation."

After the revolution of 1893, the crown lands disappeared as a separate entity when their 971,463 acres were added to the government lands. Alexander, longtime head of the Hawaiian government survey, wrote that "between the years 1850 and 1860, nearly all the desirable government land was sold, generally to natives." From September 1846 to December 31, 1857, sales totaled 182,013.51 acres; income from such sales was \$216,364.36.<sup>59</sup>

All lands excepting house lots were subject to the rights of tenants. These had to be protected as the ancient feudal system of tenure crumbled. The result was the *kuleana* grant, provided for by law in August 1850. Fee simple titles, free of commutation, were given to all Hawaiian tenants for the lands they cultivated. House lots in Hilo, Lahaina, and Honolulu were excluded. On each island some government land was set apart "to be sold in fee simple lots of from one to 50 acres to [Hawaiians] not otherwise furnished sufficient lands, at a minimum price of 50 cents an acre." Considerable discussion of possible measures to prevent Hawaiian landowners from "improvident" sale of their holdings brought no effective action. The *kuleana* of the commoners totaled somewhat fewer than thirty thousand acres. This modest figure merits comment. About three thousand claims were either duplicates or rejected as bad. Of the remainder not awarded, many were not pursued before the Land Commission or were surrendered to *konohiki* by claimants. And hundreds of claimants died without leaving legal representatives. As of February 1856, the government had received some \$20,000 in cash commutations, plus lands made over by *konohiki* in lieu of cash payment.<sup>60</sup>



A year and nine months elapsed between the initial labors of the Board of Commissioners and the action of the Privy Council in December 1847. During this period, the commissioners sought time by considering claims to house lots, many of them filed by foreigners. Why house lots? They were simpler to resolve. The commissioners put it this way:

[B]etween the ownership of lands for cultivation, and mere building lots, there are often broad lines of distinction. Mere building lots were never bestowed by the King or lords for the purpose of being given out to tenants, as was uniformly the case with lands suitable for cultivation. It follows therefore, that (with some exceptions, which in all cases must be proved) in relation to building lots, there is no third class of persons having the rights of lords over tenants.<sup>61</sup>

A claimant to Hawaiian lands had to do two things: (1) file a claim (*helu*), which, along with all others, was assigned a number in order of reception; (2) produce evidence to support the claim, in the form of documents or written or oral testimony presented to the Board of Commissioners. After considering such evidence, the board then either made a Land Commission award or refused to do so. When there were counter-claimants to the same piece of land, the board decided who should get the award.

Claims and documents substantiating them, if any, were recorded in two series: Foreign Register (three volumes) and Native Register (nine volumes). Testimony was likewise divided between Foreign Testimony (sixteen volumes plus a volume of translations) and Native Testimony (fourteen volumes numbered 1–13 and 16, there being no volumes 14 and 15). Copies of registers and testimony are at the Archives of Hawai'i. Space limitations forbid detailed discussion of these records. It is enough to say that they provide a wealth of information invaluable to the historian.

Successful claimants got Land Commission awards, which gave complete title but did not extinguish the government's interest. To do so, as we know, awardees had to pay a "commutation." They then got "royal patents" in fee simple. The commissioners set the commutation at one-third of the unimproved value of the land at the time of the award. But on June 8, 1847, the Privy Council reduced the rate

to one-fourth for house and building lots. Recipients of awards could not be dispossessed for failure to pay commutation, with the result that "some awards remained unpatented for many years." To get its money, the government in 1909 put liens on such unpatented awards.<sup>62</sup>

The awards themselves are entered in ten large volumes (some with more than one part). Here we find claim number, claimant, award (with or without a summary of the facts supporting it, which in some cases amounts to quite a detailed history), a sketch (sometimes including the neighborhood), survey notes, and costs.

Unfortunately, the quality of the surveys ranged from laudable to laughable. Arthur C. Alexander, manager of the land and survey department of American Factors, made this comment:

The greatest defect of our land system . . . has not been its complex character, but has been the imperfect character of the earlier surveys and descriptions . . . the surveyors . . . had no . . . statement [of rules and principles] to guide them. They were not informed as to how they were to do their work, what land was to be included or what excluded, what degree of accuracy was required, or how corners were to be marked . . . most of the surveyors had no idea of the value of accuracy, and the instruments used were of all kinds. . . . No one was required to show his qualifications before being employed . . . as a surveyor, and absolutely no effort was made to test the accuracy of the work done. As a matter of fact, under the circumstances it would have been a physical impossibility to have done so. Only in rare instances were corners marked and adjoining surveys made to agree.<sup>63</sup>

Alexander's critique of the work done by individual surveyors is reproduced as an appendix to this article.

On August 26, 1847, the Board of Commissioners put a moratorium on the issuance of final awards until after February 14, 1848, the last day allowed by law for the presentation of claims. The commissioners reasoned that

if they make awards upon claims before the expiration of the time for presenting claims, other claimants to the same lands, having no knowledge of previous claims presented to said Board, may, subsequent to

such awards and prior to the 14th day of February next, present their claims to lands already awarded upon; and thus by delivering awards previous to the expiration of the time for presenting claims, the Board might work great injury to innocent third persons.<sup>64</sup>

About the same time, the *Polynesian* complained that land was locked up by the policy of the chiefs and the prejudices of its few owners and in consequence bore an artificially high value. Eligible store and house lots, when available, commanded from \$1,000 to \$8,000 and seldom changed hands. The newspaper foresaw plentiful lands on the market at fairer prices when the Land Commission finished its work and the chiefs carried out its principles. We may note here that in August-September 1846 Stephen Reynolds offered to sell all his Honolulu town lots—fifteen parcels of varying sizes, five of them corner lots, another seven abutting major streets, and one wharf lot. His asking price: \$40,000. The government replied no, thanks. It thought Reynolds wanted too much.<sup>65</sup>

The question of land ownership by foreigners inspired much heated debate during and after 1845. A leading topic concerned the right of long-time resident aliens to get fee simple titles to their holdings free of commutation. A law of June 1847 allowed aliens to get fee simple patents to lands they held at the date of the act but required payment of the usual commutation and forbade sale of the land to anyone not a Hawaiian subject. Protests followed. U.S. Commissioner Anthony Ten Eyck complained to Washington about Hawai'i's "unjust" land laws; he was reminded that as an independent nation Hawai'i could make the rules. At the same time, developing markets in Oregon and California increased pressure for fee simple alien ownership of agricultural land. In September 1848, the *Polynesian* presented a long, hostile critique of the *konohiki* and leasing systems.<sup>66</sup>

Two years of discussion led to an act of July 10, 1850, which gave aliens full fee-simple ownership and transfer rights.<sup>67</sup> Thirty-one years after the death of Kamehameha I the "land revolution" was complete. It has borne much and varied fruit during the past century and a half. But today, as in 1850, all valid titles find their origin in the Mahele Book and the Land Commission awards.

## APPENDIX

*Surveyors for the Land Commission.*<sup>68</sup>

*Alexander, W. P.*—One of the most careful surveyors of that time.

*Bailey, Edward*—Work was fairly good; main fault was the correcting of errors of closure in the office without testing on the ground.

*Baldwin, Dwight*—Surveyed only one or two small pieces in Lahaina.

*Bishop, Artemas*—Had no conception of the value of accuracy or the desirability of making adjoining surveys agree, consequently his surveys are extremely inaccurate and inconsistent.

*Dillon, James*—Work was fairly good; used an engineer's theodolite and the magnetic north of the initial point, a method which has the fault that a blunder in reading or recording the magnetic bearing of the first course may swing the whole survey though an angle of several degrees.

*Dole, Daniel*—Surveyed only a few small kuleanas in Waikiki.

*Emerson, John S.*—The accuracy of his work was impaired by the employment of an unreliable chainman, who, in staking out land sales, Joseph S. Emerson reports, was in the habit of placing the pin in the ground beyond the end of the chain, thus giving more land than the calculated area called for.

*Fuller, John*—An extremely careful surveyor; both Joseph S. Emerson and E. D. Baldwin, who have had much experience in rerunning his surveys, say that he was the most accurate surveyor of his time.

*Gower, John T.*—A very careless surveyor.

*Hopu, Asa*—This surveyor evidently used a compass that was quite "off center," as his surveys have to be swung about 4° counterclockwise to fit the ground.

*Kahema, Job*—Work was poor.

*Kalama, S. P.*—One of the most reliable native surveyors of that time, with a very extensive knowledge of the names and boundaries of Hawaiian lands.

*Kalanikahua, D.*—As far as I can learn, not a very reliable surveyor.

*Kaona, J.*—Surveyed only a few small kuleanas near Honolulu.

*Keohokalole, Abraham*—Surveyed only a few small kuleanas in Wailuku, Maui; work was revised by Edward Bailey.

*Kittredge, Chas. S.*—A well trained surveyor; work was not as good as one would expect from his training.

*Lyman, Fred. S.*—A very careful surveyor.

*Lyman, Henry M.*—Like his brother, a very careful surveyor; said by C. J. Lyons to have used the average magnetic north in writing out his descriptions.

*Lyons, Curtis J.*—Perhaps the most careful and conscientious surveyor of that time; used the "average needle" in his descriptions.

*Makalena, John W.*—Work fairly good, except when he attempted to survey large tracts.

*Meyer, R. W.*—Said to have been educated in Germany as a civil engineer; a very careful and intelligent surveyor.

*Metcalf, Theophilus*—One of the good surveyors of that time; described by C. J. Lyons as "a very shrewd and practical man, whose surveys have the merit of always exhibiting and referring to natural features for fixing the lines run." His compass is said by the same authority to have read about 50' to the east of magnetic north, so that his surveys should be corrected by this amount before being run out.

*Nahale*—Did some surveying in Wailuku, Maui; work revised by Edward Bailey.

*Pease, W. H.*—One of the most careless and unreliable surveyors of that time.

*Pelham, John*—Another very unreliable surveyor.

*Polapola, John*—Only made a few surveys of small pieces; work said to have been fair.

*Richardson, George*—Work said to have had the same fault as his brother John's (see below); they may have used the same compass.

*Richardson, John*—Must have used a very defective compass; his distances are good, while his bearings in most cases are quite unreliable.

*Rowell, G. B.*—Only did a limited amount of surveying at Waimea, Kauai.

*Thurston, Asa G.*—Work was fair.

*Turner, A. F.*—Said to have used an English theodolite, and, like James Dillon and Wm. Webster, to have written his notes out in terms of the magnetic north of the initial point. His surveys as a rule fit together and close well, but are not easy to rerun, many of them bearing strong evidence of having been "doctored."

*Ua, L. S.*—Work was good for a native surveyor; like Kalama and Makalena, Ua had an intimate knowledge of Hawaiian lands and boundaries.

*Webster, William*—Perhaps the best trained and qualified civil engineer in the islands at that time; a very careful surveyor, using a theodolite and the initial magnetic north.

Most, if not all, of the early native surveyors were trained at Lahainaluna School under W. P. Alexander. While not always reliable, they were never guilty in their kuleana surveys of such grossly inaccurate work as was done by some of the white men. They also had a great advantage over many of the white surveyors in their intimate acquaintance with Hawaiian land matters and the language.

#### NOTES

- <sup>1</sup> Examples are Lilikalā Kame'elehiwa's *Native Land and Foreign Desires, Pehea Lā E Pono Ai?* (Honolulu: Bishop Museum P, 1992); Maivan Lam, "The Imposition of Anglo-American Land Tenure Law on Hawaiians," *Journal of Legal Pluralism and Unofficial Law* 23 (1985): 103–28; and Ulla Hasager and Jonathan Friedman, ed., *Hawai'i: Return to Nationhood* (Copenhagen: IWGIA, 1994).
- <sup>2</sup> William Richards to Lt. Charles Wilkes, 15 Mar. 1841, File M126, AH; *Indices of Awards Made by the Board of Commissioners to Quiet Land Titles in the Hawaiian Islands* (Honolulu: Star-Bulletin Press, 1929) ix, x, 1; *Investigation by Command of the King and Premier of the Hawaiian Islands, in Vindication of the Course Pursued by His Majesty . . .* (Honolulu: Government P, 1846) 51, 55–56, 64; Department of Geography, U of Hawai'i, *Atlas of Hawaii*, 2nd ed. (Honolulu: U of Hawai'i P, 1983) 11.
- <sup>3</sup> *Indices* 2; Foreign Testimony 1: 4–6, 13. AH (hereafter FT).
- <sup>4</sup> Ralph S. Kuykendall, *The Hawaiian Kingdom, 1778–1854: Foundation and Transformation* (Honolulu: U of Hawai'i P, 1957) 270–71.
- <sup>5</sup> Kuykendall, *The Hawaiian Kingdom* 271.
- <sup>6</sup> Quoted in Glynn Barratt, *The Russian View of Honolulu, 1809–26* (Ottawa: Carleton UP, 1988) 237. *Investigation* 9, 13, 20, 22–24, 30, 39, 44, 47, 54, 65.
- <sup>7</sup> *Investigation* 8, 12, 19, 20, 27, 33, 35, 36, 46; FT 1: 13, 113–14; FT 2: 8.
- <sup>8</sup> FT 1: 113–14, 117.
- <sup>9</sup> *Investigation* 27.
- <sup>10</sup> *Indices* 2; "Sandwich Island Laws," *The Hawaiian Spectator* 2.3: 348; Land Commission Award (hereafter LCA) 2: 687; Native Register (hereafter NR) 1: 166; Native Testimony (hereafter NT) 2: 256; LCA 1: 107–09, 306–07; NR 1: 25, 27; FT 1: 29, 32; NT 1: 56; IDLF, 15 June 1847.
- <sup>11</sup> *Indices* 1, 4–5; *Translation of the Constitution and Laws of the Hawaiian Islands* (Lahainaluna, 1842) 2–3, 10, 12; *Investigation* 51, 64.

- <sup>12</sup> LCA 1: 186-88; 2: 1508; Foreign Register (hereafter FR) 1: 73; FT 1: 152-53.
- <sup>13</sup> LCA 1: 507-08; FR 1: 123-24; FT 1: 108-19.
- <sup>14</sup> LCA 2: 19, 66; NR 2: 312; FT 2: 79, 209-10.
- <sup>15</sup> Levi Chamberlain's Journal (hereafter LC) 22 Sept. 1823. HMCS.
- <sup>16</sup> LCA 1: 53-55; FR 1: 10-14; FT 1: 10.
- <sup>17</sup> LCA 1: 125-26, 414; FR 1: 46; FT 1: 35, 68; NT 1: 66; "Biographical Information about 'Haole Families' from Bruce Cartwright Collection, N-Z." AH.
- <sup>18</sup> LCA 1: 87-88; FR 1: 38; FT 1: 24.
- <sup>19</sup> LCA 1: 169-72; FR 1: 65, 69; FT 1: 63, 151; 2: 258.
- <sup>20</sup> Hiram Bingham, *A Residence of Twenty-one Years in the Sandwich Islands* (New York: H. D. Goodwin, 1855) 341.
- <sup>21</sup> LCA 2: 1508; NT 3: 725; LCA 10: 346, 549; NR 2: 44; FT 2: 164-65; NT 2: 57, 59, 392, 492; 3: 129-30; LCA 2: 77; NR 2: 350; FT 2: 164; NT 2: 491; LCA 2: 179; NR 2: 443; FT 2: 231-32; NT 2: 560; LCA 2: 197; FT 2: 38; NT 2: 331-32; LCA 2: 391; NR 2: 580; FT 2: 299; NT 3: 40; LCA 2: 1209; NR 3: 325; FT 3: 60, 242; NT 3: 385; LCA 2: 1480; NR 3: 435; NT 3: 726.
- <sup>22</sup> Stephen Reynolds's Journal (hereafter SR), 24 Mar. 1831. Typescript. HHS.
- <sup>23</sup> SR, 28 Apr. 1831.
- <sup>24</sup> LC, 3 Oct. 1831.
- <sup>25</sup> SR, 31 Dec. 1831.
- <sup>26</sup> SR, 29 Apr. 1834.
- <sup>27</sup> SR, 19 May 1834.
- <sup>28</sup> FO & Ex, 7 Jan., 16 Nov. 1836; LC, 12-16 Nov. 1836; SR, 6 Jan. 1836; Kuykendall, *The Hawaiian Kingdom* 147-48.
- <sup>29</sup> SR, 19 July 1836.
- <sup>30</sup> SR, 4, 5, 6 Oct. 1836; Kuykendall, *The Hawaiian Kingdom* 145; W. S. W. Ruschenberger, *Narrative of a Voyage Round the World . . . 1835, 36, and 37 . . .* (London: Richard Bentley, 1838) 1: 496.
- <sup>31</sup> SR, 15 Oct. 1836.
- <sup>32</sup> LC, 8, 10, 12, 15, 16 Nov. 1836; FO & Ex, 16 Nov. 1836; *Treaties and Conventions Concluded Between the Hawaiian Kingdom and Other Powers since 1825* (Honolulu: "Elele" Book, Card & Job Print., 1887) 3; Kuykendall, *The Hawaiian Kingdom* 147-48.
- <sup>33</sup> LCA 1: 83-86; FR 1: 34, 36-37; FT 1: 21, 25-26.
- <sup>34</sup> Quoted in Josephine Sullivan, *A History of C. Brewer and Company . . .* (Boston: Walton Advertising & Printing Co., 1926) 62.
- <sup>35</sup> FT 1: 11.
- <sup>36</sup> LCA 1: 100; FR 1: 41; NR 1: 50; FT 1: 28; FO & Ex, 3, 18 Feb. 1840; IDLF, 27 Feb. 1840.
- <sup>37</sup> FO & Ex, 7 July 1840.
- <sup>38</sup> LCA 1: 144; FR 1: 56; FT 1: 47; SR 20 June 1841; *P* 28 Nov. 1840.
- <sup>39</sup> FO & Ex, 31 May 1841.
- <sup>40</sup> Kuykendall, *The Hawaiian Kingdom* 275-76; SR, 18, 19, 22 June, 14 July 1841.
- <sup>41</sup> W. D. Alexander, "A Brief History of Land Titles in the Hawaiian Kingdom,"

- HAA, 1891: 118; *Constitution and Laws, 1842*; Proclamation of May 10, 1842. AH.
- <sup>42</sup> SR, 25 Feb., 9 Mar. 1843; British Commission Land Claims Book, 1, 105, FO & Ex, 1843; Kuykendall, *The Hawaiian Kingdom* 277.
- <sup>43</sup> Memorandum, 7 Sept. 1844, FO & Ex.
- <sup>44</sup> Laws and Regulations Passed by . . . Kamehameha III . . . and His Council . . . August 11, 1843, FO & Ex, 1843.
- <sup>45</sup> Memorandum, 7 Sept. 1844, FO & Ex.
- <sup>46</sup> FO & Ex, 17, 18, 19, 20, 21, 24, 25 Feb. 1845; P 1 Mar. 1845; SR, 26 Feb. 1845.
- <sup>47</sup> P 31 May 1845.
- <sup>48</sup> P 25 Oct. 1845; Richards to Wilkes, 15 Mar. 1841; Kuykendall, *The Hawaiian Kingdom* 274-75.
- <sup>49</sup> P 26 July, 2, 9 Aug. 1845; FO & Ex, 12, 13 June, 9 July 1845; LC, 12 June 1845.
- <sup>50</sup> P 6, 20 Dec. 1845; Kuykendall, *The Hawaiian Kingdom* 258-60.
- <sup>51</sup> P 20 Dec. 1845.
- <sup>52</sup> P 14 Feb. 1846.
- <sup>53</sup> *Indices* 9, 10; W. D. Alexander, "A Brief History" 110.
- <sup>54</sup> *Indices* 8-9, 12; W. D. Alexander, "A Brief History" 110; P 19 June 1847.
- <sup>55</sup> *Indices* 11-12.
- <sup>56</sup> P 29 May, 3 July 1847.
- <sup>57</sup> *Investigation* 55, 56, 64, 68.
- <sup>58</sup> *Indices* 53-54; PCR, 4: 300, 305, 404; Kuykendall, *The Hawaiian Kingdom* 284-94.
- <sup>59</sup> W. D. Alexander, "A Brief History" 118; S. P. King, "History of Crown Lands May Determine Their Future," HSB, 23 Dec. 1994, A-13; *Report of the Minister of the Interior to the Legislature of 1858*, 5.
- <sup>60</sup> Kuykendall, *The Hawaiian Kingdom* 291-93; *Report of the Minister of the Interior to the Legislature of 1856*, 15.
- <sup>61</sup> *Indices* 3.
- <sup>62</sup> P 3 July 1847; W. D. Alexander, "A Brief History" 111; Kuykendall, *The Hawaiian Kingdom* 280.
- <sup>63</sup> A. C. Alexander, "Land Titles and Surveys in Hawaii," *Hawaiian Planters' Record*, Aug. 1920, 72-73.
- <sup>64</sup> IDLF, 26 Aug. 1847.
- <sup>65</sup> P 9 Jan., 25 Sept., 1847; CCMB, 1846-1847, 90 (5 Sept. 1846); SR, 21 Aug., 8 Sept. 1846.
- <sup>66</sup> P 16 Sept. 1848; Kuykendall, *The Hawaiian Kingdom* 295-97.
- <sup>67</sup> P 13 July 1850.
- <sup>68</sup> A. C. Alexander, "Land Titles" 76-77.